Anthony L. Lanza, Bar No. 156703
Brodie H. Smith, Bar No. 221877
LANZA & SMITH
A Professional Law Corporation
3 Park Plaza, Suite 1650
Irvine, California 92614-8540
Telephone (949) 221-0490
Facsimile (949) 221-0027

Attorneys for Defendants Robert T. Hume, Joey C. Montoya, Stanley Crawford, Avrum Katz, Kwo Lee, Inc., and Shuzhang Li

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

HARMONI INTERNATIONAL SPICE, INC., a California corporation, and ZHENGZHOU HARMONI SPICE CO., LTD., a corporation,

Plaintiff,

v.

WENZUAN BAI, an individual, JICHENG YE, an individual, RUOPENG WANG, an individual, ROBERT T. HUME, an individual, JOEY C. MONTOYA, an individual, STANLEY CRAWFORD, an individual, AVRUM KATZ, an individual, HUAMEI CONSULTING CO., INC., a corporation, KWO LEE, INC., a California corporation, SHUZHANG LI, an individual, C. AGRICULTURE GROUP CORP., corporation, HEIBEI GOLDEN BIRD TRADING CO., LTD., a corporation, QINGDAO TIANTAIXING FOODS, CO., LTD., a corporation, JINXIANG HEJIA CO., LTD., a corporation, QINGDAO LIANGHE INTERNATIONAL TRADING CO., LTD., a corporation, CHEN HONGXIA, an individual, JIN XIA WEN, an individual, MINGJU XU, an individual, CAI DU, an individual, QINGHUI ZHANG, an individual, LUCY WANG, an individual,

Defendants.

CASE NO: 2:16-cv-00614

Honorable Beverly Reid O'Connell

OPPOSITION TO *EX PARTE* APPLICATION FOR EXPEDITED DISCOVERY, BY DEFENDANTS HUME, MONTOYA, CRAWFORD, KATZ, LI, AND KWO LEE, INC.

Defendants Robert T. Hume ("Hume"), Joey C. Montoya ("Montoya"), Kwo Lee, Inc., a California corporation ("Kwo Lee"), and Shuzhang Li ("Li"), Avrum Katz ("Katz"), and Stanley Crawford ("Crawford") (collectively "Defendants") *specially* appear to oppose Plaintiffs' Ex Parte Application for Expedited Discovery on the grounds set forth in this Opposition.

LANZA & SMITH, PLC

March 7, 2016

/s/Brodie H. Smith
Brodie H. Smith
3 Park Plaza, Suite 1650
Irvine, CA 92614
Phone: (949) 221-0490
Fax: (949) 221-0027
Brodie@lanzasmith.com
Attorneys for Defendants
Robert T. Hume, Kwo Lee, Inc.,
Shuzhang Li, Joey Montoya, Avrum Katz,
and Stanley Crawford

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Codes

I. INTRODUCTION

This action is a retaliatory lawsuit filed to intimidate two domestic garlic farmers, Defendants Crawford and Katz, into withdrawing their Department of Commerce ("DOC") review request of Plaintiff Harmoni's (an exporter of Chinese garlic) cash deposit rates.

Plaintiff Harmoni's Motion for Preliminary Injunction ("PI Motion"), and the *Ex Parte* Application for Expedited Discovery to support the PI Motion, rest on fallacious legal grounds. The speciousness of Harmoni's 'game plan' cannot be overstated. Harmoni is currently subject to a review of its artificially low garlic cash deposit rates by the DOC, assuming Defendants Crawford and Katz do not withdraw their review request by the April 11, 2016, deadline. Rather than simply respond to the review request in the DOC and demonstrate why their cash deposit rates should not be increased, Harmoni filed this separate RICO lawsuit – so as to effectively circumvent federal regulatory oversight. Plaintiffs' PI Motion asks the Court to render decisions on many of the same ultimate issues before the DOC on Harmoni's review hearing. They ask the Court to jump ahead of the DOC, and before the DOC can render a ruling, to determine that statements made in petitions filed with the DOC were false. They want the Court to issue an injunction forcing Defendants to "retract" statements in their DOC filings, thereby preventing the DOC from doing its job and ruling on these issues. The breadth of problematic issues this raises is truly difficult to cover in a single brief, which is the first of many reasons *ex parte* relief is inappropriate here.

Plaintiffs' *Ex Parte* Application seeks an order permitting them to take seven depositions (in Los Angeles) of witnesses domiciled in New Mexico and New York, and to serve highly objectionable and irrelevant document demands—all to be completed by March 21st in the hopes of gaining evidence for a PI Motion which has no basis in law. Among the many terminal flaws in Plaintiffs' plan:

- The litigation privilege of California Civil Code 47(b) is an absolute privilege.

It is a complete bar to Plaintiffs' PI Motion – and this entire lawsuit as to most Defendants. It is broadly construed and applies to statements made in connection with any type of governmental or quasi-governmental proceeding. The Court cannot force Defendants to "retract" DOC petitions or statements therein – and thus expedited discovery is pointless.

- By the same token, the *Noerr-Pennington* doctrine protects Defendants' right to petition the government for redress of grievances. It holds that no federal statute can be used to prevent a party from exercising its privileges under the Petition Clause of the First Amendment of the U.S. Constitution. The *Noerr-Pennington* doctrine also renders Plaintiff' PI Motion hopeless.
- The rule against prior restraints on speech mandates that Plaintiff's PI Motion be denied.
- None of the Defendants specially appearing through this Opposition have appeared in the case yet. They must be permitted to challenge personal jurisdiction before they are subject to discovery in this action.
- The proposed expedited discovery is overbroad and ventures into highly objectionable matters of attorney-client privilege, attorney work product, and confidentiality, and matters that have no realistic chance of affecting the outcome of the PI Motion or salvaging this fatally flawed lawsuit.
- The number of depositions requested (seven) is without precedent for expedited discovery.
- Because not all parties have been served with a summons yet (especially the Chinese defendants), the seven proposed deponents would be subject to deposition on the same topics *twice*—once in expedited discovery and again after new parties enter the case. There are a total of 22 defendants, only three of which have been served with the Amended Complaint, and half of which has not been served at all.
- The proposed Deposition Notices seek to take the depositions of seven out-of-

state defendants in Los Angeles, on shortened notice, all on the same day and at the same time.

- The DOC and/or Court of International Trade is the proper forum, with exclusive jurisdiction to litigate the matters set forth in Plaintiffs' Amended Complaint. 28 U.S.C. §1581; *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346 (Fed. Cir. 2010).

II. BACKGROUND OF THE CASE

This action is a strategic and retaliatory lawsuit filed to discourage two domestic garlic farmers, Defendants Crawford and Katz, from continuing with an administrative review of Plaintiff Harmoni's[1] zero cash deposit rate on garlic imported from China.

Since 2004, Plaintiff Harmoni China has been the *only* Chinese exporter of Garlic to enjoy a zero cash deposit rate. Harmoni pays nothing, while nearly every other exporter pays substantially higher rates, up to $4.71/kg. This has allowed Harmoni to monopolize the U.S. garlic market, while flooding the U.S. with cheap, inferior garlic. Harmoni has been able to retain this zero cash deposit rate by "gaming" the U.S. Department of Commerce ("Commerce" or "DOC") and its review system (explained in more detail below.)

Now Defendants Crawford and Katz, two domestic Garlic producers, have requested that Commerce review Harmoni China – just like every other Chinese exporter. In response, Harmoni filed this retaliatory lawsuit, attempting to bully Defendants into withdrawing the review request (so Harmoni China can continue to dump cheap Chinese garlic in the U.S.).

Harmoni's Amended Complaint consists of a blend of small amounts of truth with

[1] Plaintiff Harmoni International Spice, Inc. (a/k/a "Harmoni USA") is a domestic *importer* of garlic. Zhengzhou Harmoni Spice, Co. (a/k/a/ "Harmoni China") is a Chinese *exporter* of garlic. They are sometimes referenced collectively herein as "Harmoni."

large amounts of fiction. While its description of U.S antidumping law and procedures is partially accurate, its portrayal of the parties and Defendants' alleged enterprise is a creative fantasy.

Many of Harmoni's allegations center on U.S. antidumping law and Commerce's 1994 antidumping order addressing fresh garlic from China. Antidumping orders ensure that imports of certain products are sold at their fair value. For imports sold below their fair value, Commerce assesses antidumping duties in amounts to bring the import prices up to their "fair value." Harmoni China currently accounts for well over 50% of Chinese garlic shipments to the U.S. and falsely claims some inherent right to continue receiving a 0.00% cash deposit rate (a rate it has maintained by "gaming" the DOC system).

A. Background Regarding Plaintiff Harmoni and the FGPA

The DOC's 1994 China Garlic Order (the "Order") covers all Chinese garlic exporters. Harmoni China, however, differs from all the other Chinese garlic exporters in that Harmoni has a collusive relationship with the Fresh Garlic Producer's Association ("FGPA"). Year after year, the FGPA, the only petitioner in the antidumping proceeding dating back from the inception of the Order, ensures that Harmoni China's garlic exports are not reviewed by the DOC. This protects Harmoni from receiving a new dumping margin and Harmoni China maintains its 0.00% cash deposit rate and, thus, an anti-competitive advantage over competitors. This advantage ensures that the vast majority of Chinese garlic in U.S. markets comes from one exporter (Harmoni) and is funneled through one group of distributors (the FGPA.) No one else can compete.

Four large, corporate garlic producers and sellers in California make up the FGPA: Christopher Ranch L.L.C. ("Christopher Ranch"); The Garlic Company; Valley Garlic; and Vessey and Company, Inc. Christopher Ranch is the largest seller, effectively controlling the garlic business in the U.S. Christopher Ranch is aided in its U.S. market domination with the help of Harmoni China's no cash deposit, low-priced garlic. With access to Harmoni China's unwarranted 0.00% cash deposit rate on Chinese garlic

imports, the FGPA has expanded their U.S. market control with the lowest priced garlic in the world. The effect has been to eliminate or cripple most competition in the U.S. market for fresh garlic.

Plaintiffs filed this action because they fear the pending antidumping administrative review that Defendants Crawford and Katz initiated on January 7, 2016 (81 Fed. Reg. 736) will result in Harmoni finally being assessed millions of dollars in antidumping duties and the loss of its 0.00% cash deposit rate. According to the DOC's rescission regulation, 19 C.F.R. § 351.213(d)(1), interested parties have 90 days from the date of initiation to withdraw their respective review request(s). The government's four-day closure due to due to snowstorm "Jonas" pushed Katz and Crawford's rescission deadline date to April 11, 2016. The timing of Plaintiff's Amended Complaint, with many of its allegations occurring years earlier, shows Plaintiffs' true intent: to intimidate Katz and Crawford into withdrawing their review request.

B. The FGPA Manipulates U.S. Antidumping Law and Procedures

Interested parties may request administrative reviews ("ARs") once a year – on the anniversary date of the antidumping ("AD") order. 19 U.S.C. § 1675. While domestic interested parties may request reviews of all exporters of the subject merchandise (19 C.F.R. § 351.213(b)(1)), foreign exporters can only request a review of themselves. 19 C.F.R. § 351.213(b)(2).

Under 19 U.S.C. § 1677f-1, no exporter is excluded from the Chinese Garlic Order because the statute requires that all known exporters be reviewed. That is, all exporters from non-market economy ("NME") countries are presumed to be companies covered under the Order. No companies are *required* to be specifically identified in a review request, *Transcom v. United States*, 294 F.3d 1371 (Fed. Cir. 2002), although the FGPA *does* identify specific companies in order to take advantage of a loophole.

Antidumping regulations afford two ways in which an interested domestic producer can request review of exporters. *Id.* The interested party can request that all

exporters from a given country be reviewed, or that certain listed exporters be reviewed. *Id.* The FGPA, in order to maintain their anticompetitive advantage with Harmoni, wants all Chinese exporters reviewed *except* Harmoni. Because of this, the FGPA cannot use the general procedure of requesting that all Chinese exporters be reviewed. Instead, the FGPA files review requests listing virtually all Chinese exporters, including Harmoni China. When this type of specific review request is filed, regulations require that the list be taken from governmental records of all exporters who actually exported garlic into the country the previous year. Thus, the FGPA cannot simply omit Harmoni from the list.

However, in a loophole that was likely unintended, the antidumping regulatory structure allows the FGPA to withdraw the names of specific exporters from any review request listing specific companies (but not general review requests). Thus, every year (dating back well over a decade), the FGPA plays the same game of first requesting that Harmoni China and all other exporters (listed by name) be reviewed, and then withdrawing Harmoni China from the list. To hide the scheme, the FGPA also withdraws the names of exporters who have ceased to export to the United States, hoping that Harmoni's special treatment will be overlooked as but one name among many. Using this loophole, the FGPA and Harmoni have managed to manipulate U.S. Antidumping law to create for themselves an advantage that virtually guarantees they will be the only real "player" in this garlic industry. They have maintained this scheme for *twelve (12) years* and counting.

Only "domestic interested parties" can request a review of Harmoni. But the FGPA, partially *because* of this scheme, has been able to dominate the U.S. Garlic market, leaving no other "domestic interested parties" with sufficient resources or courage to challenge their scheme. Thus, the scheme perpetuates itself. Medium-sized producers of fresh garlic have long since been (1) forced out of business because of FGPA's manipulation of the antidumping law, or (2) acquired by the four members of the FGPA. For all practical purposes, very few domestic garlic producers survived who

could bring the issue to the DOC.

The FGPA and Harmoni have realized tens of millions of dollars in illicit profits this way. With only themselves and small regional farmers left as "domestic interested producers," they could count on the fact that the small, local farmers likely would not have the resources or the gumption to challenge them. Now that two small New Mexican garlic farmers have dared challenge them, Harmoni, as a puppet of the FGPA, has filed this blatantly retaliatory lawsuit in order to protect their racket. Defendants Crawford and Katz are garlic producers of subject merchandise within the meaning of the law, and have every right to file a review request. 19 C.F.R. § 351.102(b)(29)(v) and 19 U.S.C. § 1677 (9)(c).

Harmoni USA and members of the FGPA, including Christopher Ranch, ask this Court to prevent the DOC from reviewing Harmoni China's garlic sales prices to the U.S. for the latest period of review (the 21st segment, from November 2014 to October 2015). But, the U.S. Court of International Trade ("CIT") has exclusive original appellate jurisdiction of trade matters, including antidumping, and is the required forum for Plaintiffs to challenge the review request. 28 U.S.C. §1581; *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346 (Fed. Cir. 2010). At no point in the federal government's foreign commerce process for products such as garlic does jurisdiction vest in a U.S. District Court. Congress has statutorily granted exclusive jurisdiction for such matters initially with the DOC, followed by appellate rights to the Court of International Trade (CIT), followed by the U.S. Court of Appeals for the Federal Circuit (in Washington DC), followed by the U.S. Supreme Court. Harmoni may not like this structure, but there is no right to circumvent it by asking this Court to overrule Congress or exceed its jurisdictional boundaries in adjudicating foreign commerce. By filing this strategic action in District Court, Plaintiffs acknowledge that they possess no basis for filing with the DOC or CIT who have jurisdiction and specialization in this area.

C. Harmoni Blocks Crawford and Katz from Retail and Wholesale Markets

The Amended Complaint alleges that Christopher Ranch and Harmoni USA do not compete with Defendants Crawford and Katz. Harmoni claims that Crawford and Katz are mere "hobby farmers" who "only" sell Garlic in the Santa Fe farmer's market. The irony is, it is because of the FGPA/Harmoni scheme that Crawford and Katz find it difficult to profitably compete in retail and wholesale markets.

Christopher Ranch maintains displays in the Albertsons store in Taos, New Mexico, less than 30 miles from Mr. Crawford and Mr. Katz's farms, selling two large Chinese garlic bulbs for $1.00. This price is roughly 1/3rd the price Crawford and Katz are able to deliver to the same Albertsons store. Yet, the Christopher Ranch garlic has traveled more than 6,000 miles from the garlic fields in Shandong Province, China, and Christopher Ranch is making profit on the sale. Efforts by Crawford and Katz to sell to wholesalers and retailers have been rebuffed for the simple reason that Christopher Ranch can provide these same wholesalers and retailers with cheap imported garlic (albeit of inferior quality). In fact, it is partially because of the inferior quality of Harmoni/Christopher Ranch's garlic that they seek to paint Crawford and Katz as producers of a higher grade of garlic, hoping this distinction somehow robs Crawford and Katz of standing before the DOC. It does not. 19 C.F.R. § 351.102(b)(29)(v) and 19 U.S.C. § 1677 (9)(C).

III. ANALYSIS

A. Harmoni Fails to Establish Exigent Circumstances for Its *Ex Parte*

Ex parte applications "are solely for extraordinary relief and are rarely granted." *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). An ex parte application must show why the moving party should be allowed to "go to the head of the line in front of all other litigants and receive special treatment." *Id.* at 492. It must show that the moving party's cause will be irreparably

prejudiced if the underlying motion is heard according to regular noticed motion procedures. The "*rare*" cases in which ex parte applications may be proper are when: a real emergency exists, threatening immediate and irreparable injury before the adverse party can be heard in opposition (e.g., temporary restraining orders under FRCP 65(b)); or there is danger that, if given notice, the opposing party will flee or destroy evidence or hide assets; or certain routine orders where the other side has been served with the application (e.g., shortening notice of motion or for permission to file over-long brief). *In re Intermagnetics America, Inc.* 101 B.R. 191, 192-193 (C.D. CA 1989).

Although Harmoni has a pending PI Motion, the PI Motion is set to be heard after the April 11th deadline for Katz and Crawford to withdraw their review request. Under DOC procedures, the review will proceed if the request is not withdrawn by the April 11th deadline. The PI Motion will thus be moot by the time of its hearing, but the *expedited discovery* would conclude *before* the deadline. The point of the requested expedited discovery, which Harmoni hopes to complete before the April 11th deadline, is to impress upon the Defendants the costly burdens of federal litigation—in their ongoing efforts to convince Defendants to withdraw their review request. This is obviously not justification for an emergency motion.

DOC administrative reviews (ARs) proceed on the same timeline year after year. A preliminary decision is usually rendered in December, and a final decision the following June. Thus, for the current pending Garlic 21 AR, the preliminary determination can be expected in December, 2016, and the final one in June, 2017. Thus, there are no exigent circumstances – given that the PI Motion is set to be heard after the deadline to withdraw review requests (rendering it moot in that respect), and 13 months *before* the DOC's final decision. There is sufficient time to have a fully litigated hearing on the merits, not a rushed ex parte application or PI Motion. Since the PI Motion is unnecessary and premature, there are also no grounds for this *Ex Parte* Application.

B. Harmoni Fails to Show Good Cause for Expedited Discovery

Ordinarily, no party may conduct discovery until after the Rule 26(f) conference. Prior to the Rule 26 conference, a party "may not seek discovery … except … when authorized by … a court order." Fed.R.Civ.P 26(d)(1). Courts in the Ninth Circuit use the "good cause" standard to determine when expedited discovery will be permitted. *SATA GmbH & Co. Kg v. Wenzhou New Century Int'l, Ltd. et al.,* 2015 WL 6680807, at 11 (C.D. Cal. 2015) (O'Connell, J.)

The "party seeking expedited discovery in advance of [the] Rule 26(f) conference has the burden of showing good cause for the requested departure from usual discovery procedures." *Qwest Comm. Int'l, Inc. v. World Quest Networks, Inc.* 213 F.R.D. 418, 419 (D.Colo. 2003). Expedited discovery "is not the norm. Plaintiff must make some *prima facie* showing of the *need* for the expedited discovery." *American Legalnet, Inc. v. Davis*, 673 F.Supp.2d 1063, 1067 (C.D. Cal. 2009), citing *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000). Good cause exists "where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Id.* quoting *In re Countrywide Fin. Corp. Derivative Lit.* 542 F.Supp.2d 1160, 1179 (C.D. Cal. 2008).

While the good cause standard can sometimes be met when a party seeks a preliminary injunction, "expedited discovery is not automatically granted merely because a party seeks a preliminary injunction." *American Legalnet, supra,* at 1066. "Where a plaintiff seeks expedited discovery to prepare for a preliminary injunction hearing, it makes sense to examine the discovery request … on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." *Merrill Lynch, supra,* at 624.

"Factors commonly considered in determining the reasonableness of expedited discovery include: (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden

on defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." *American Legalnet, supra,* at 1066. In this case, while it is true that a PI Motion is pending, the Motion is in fact a farce; and none of the remaining factors weigh in favor of expedited discovery.

1. A preliminary injunction is pending

The original Complaint does not include a prayer for injunctive relief. The request for injunctive relief was added to the Amended Complaint (filed on the same day as the *Ex Parte*) as an afterthought to support a desperate effort to circumvent the timing of discovery under rule 26, because the goal of this litigation is to prevent the DOC from doing its job. Thus, the PI Motion is in reality a subterfuge. On page 8 of the *Ex Parte* Application, plaintiff seeks to force defendant to retract the false statements made to the DOC. This would be akin to one judge telling another that a plaintiff's case cannot be heard because the parties are supposedly lying in court submissions. This is untenable.

2. The proposed discovery is overbroad

There is an incongruity between Harmoni's Motion for Preliminary Injunction and its proposed expedited discovery. The discovery is much broader than needed for the PI Motion.

In the PI Motion, Harmoni seeks an order "to retract all false statements made in conjunction with their fraudulent petition before the DOC." (PI Motion, 25:6-7.) Setting aside for a moment the fact that Harmoni cannot Constitutionally be granted the relief they seek (for many reasons, some of which are set forth below), it follows that Harmoni's discovery should be tailored to prove that the statements in the DOC petition were "false" and "fraudulent." This raises two problems for Harmoni.

First, Harmoni has not established which specific statements from the DOC filings it believes are false. Again and again, Harmoni's Amended Complaint and PI Motion

refer obliquely to "false and fraudulent statements" without quoting or identifying them.[2] In failing to provide the Court with this basic evidence, Harmoni robs Defendants and the Court of the ability to fully evaluate its request pursuant to the "breadth of discovery" prong. Is Harmoni challenging *every* sentence in all of Defendants' DOC filings as "false and fraudulent?" The court in *American Legalnet* faulted the moving party for providing "absolutely no evidence supporting its allegations" in favor of expedited discovery. *American Legalnet, supra*, at 1066. So too has Harmoni failed to meet its burden.

Second, the proposed discovery goes far beyond the evidence needed to prove "false and fraudulent statements" in the DOC petitions, and ventures into highly objectionable matters of attorney-client privilege, attorney work product, and confidentiality. In Plaintiffs' own words, they seek:

"All Communications [of *clients* Crawford and Katz] with any co-defendant [including their *attorneys* Hume and Montoya] from January 1, 2014 to the present referring to or relating to Plaintiffs." (Mtn. Exped. Disc. 3:13-14.) They also seek discovery of the same communications from attorneys Hume and Montoya running to their clients Katz and Crawford. (Mtn. Exped. Disc. 3:13-14.) Harmoni also seeks to depose the witnesses on these same privileged topics. (Mtn. Exped. Disc. 4:23-5:26.) Clearly, these are attorney-client privileged communications, and yet Harmoni carves out no exceptions. It is also an improper attempt to drive a wedge between attorneys and clients.

The remaining document requests seek invasive financial records, offering no explanation of how the production of Crawford and Katz's "total revenues" and other

[2] The single exception to this is where Harmoni's PI Motion quotes the following language: "El Bosque Garlic Farm of Dixon, New Mexico, is a domestic interested party within the meaning of 19 U.S.C. 1667(9)(c) producing a product within the meaning of 19 U.S.C. 1677(10)." (PI Motion, 7:15-17). This statement is, in fact, true.

trade secrets and financial data can help prove that DOC filings were "false." The proposed discovery of financial information requires production of tax returns and other financial information, which is subject to objections based on privacy and confidentiality (especially among competitors in the U.S. garlic market). These are highly contested areas, and often result in protracted discovery battles even during the course of normal (non-expedited) discovery. These subjects are not the type that can be resolved on an expedited basis. Additionally, gathering and producing detailed financial records going back several years takes significant time. It is a task that is inappropriate for expedited discovery.

3. There is no legitimate purpose for the requested discovery

First, the Litigation Privilege, the *Noerr-Pennington* Doctrine, and California's Anti-SLAPP statute bar the relief Harmoni seeks to obtain through its PI Motion. This is exceedingly clear. This Court must analyze the PI Motion in order to grant ex parte relief – and yet this is unfair on an emergency basis. Even without the benefit of an opposition brief (forthcoming), Defendants believe it will be obvious to the Court that Plaintiffs' PI Motion is untenable. This means that Plaintiffs' requested expedited discovery is pointless. The unsustainability of the PI Motion is discussed in more detail in Sections C *et seq*. below.

Second, even if Harmoni can prove that Defendants Katz and Crawford's farming operations are "small," it will not matter. A "domestic interested party" in a DOC AR is defined simply as any "producer…of like product." 19 CFR §351.102(b). The term "like product" has *never* been interpreted, in the agricultural context, to exclude different "grades" of the same food. Apples are apples; garlic is garlic. Nor has it been interpreted to have some sort of lower threshold which excludes local, non-corporate farmers. (If such authority existed, Plaintiffs would have cited it.) Likewise, *if* Harmoni can somehow show, through expedited discovery, that attorneys Hume and Montoya recruited their clients Katz and Crawford, it simply will not matter. There is nothing

"fraudulent" or wrongful about that. Plaintiffs' working theory is truly frivolous.

Every DOC garlic notice (preliminary or final) contains a section entitled "Scope of the Order." Using the Scope language in the Garlic 19 preliminary decision (79 F.R. 72626, Dec. 8, 2014) as an example: "The merchandise covered by the order includes all grades of garlic, whole or separated into constituent cloves." Thus, again, the discovery plaintiff seeks is simply irrelevant. Plaintiffs have put forth only token effort to show that it *is* relevant, hoping to obfuscate the legal baselessness of the PI Motion. In that sense, Plaintiffs have again failed to meet their burden of showing that there is good cause for the proposed expedited discovery, because the information they seek is not germane to any relief that is *actually* available pursuant to Harmoni's PI Motion.

4. The burden on defendants would be substantial

Harmoni cites six cases in which expedited discovery was granted, two from this Court (see, ex parte application, 6:10-8:21). None of those cases permitted more than one deposition, and in some, the moving party only sought written discovery. Here, Defendants seek *seven* depositions in a two week period. Four of the proposed deponents live in New Mexico, but each in distinct regions of New Mexico. (Amended Complaint, para. 42-45). The other three proposed deponents, on information and belief, reside in or around New York. Harmoni seeks to take the depositions of all four of the New Mexican Defendants *in Los Angeles* (see Exhibit 2 to Schreiber Decl.), thereby burdening the deponents with last-minute travel expenses, including late hotel and air reservations. Further increasing the burden, the Notices of Deposition set *all seven depositions* for the same date and time (March 21, 2016 at 9:00 a.m.), ensuring wasted time as each deponent waits for the others to conclude. At four hours each for seven depositions, it is impossible to take all 7 depositions in one day, unless depositions occur simultaneously, which would violate each Defendant's right to observe other depositions.

Further, Plaintiffs have not yet filed proofs of service for all Defendants. Most (if not all) of the Chinese defendants have yet to be served and may not even know about

this case yet. Thus, those Defendants, after they eventually appear in the case, would have the right to depose the proposed deponents on the same topics – again. Harmoni argues that there is no burden because they allegedly will not cover these same topics in future depositions with the same deponents, but other parties would have the right.

5. The requested discovery is premature

Of the six Defendants specially appearing together in this opposition, *none* have yet (1) filed a responsive pleading, (2) been served with the Amended Complaint, or (3) appeared in the action. This Court does not have personal jurisdiction over many defendants and, in fact, Defendants will argue in Rule 12 motions that there is no personal jurisdiction over at least three of them (Montoya, Crawford and Katz.) As such, this motion is premature, as it cannot yet be determined which discovery vehicles would be appropriate for these Defendants. (Indeed, they should not even *be* Defendants for long.) Since there is no personal jurisdiction in this Court, Plaintiffs will need to issue subpoenas.

Harmoni does not cite any precedent for expedited discovery on parties who have yet to appear in the case; Defendants are aware of none. Defendants should, at the very least, be permitted to challenge jurisdiction and the sufficiency of the Amended Complaint before submitting to invasive, premature discovery.

There are 22 total defendants, only half of which have been served with the original complaint, and only a few have potentially responded (those being the clients of the Heller & Edwards firm). In fact, the Amended Complaint was filed on the same day as the *Ex Parte* Application, consisting of 59 pages of complex factual and legal issues, and it has not yet been served on anyone. Discovery at this early stage is extremely premature and prejudicial.

C. The Litigation Privilege Bars the Relief Sought in the Plaintiffs' PI Motion

Harmoni's PI Motion is untenable (meaning there is no good cause for expedited

discovery).[3] The PI Motion seeks an order "to retract all false made [sic] statements made in conjunction with their fraudulent petition before the DOC." (PI Motion 25:7-8). It also seeks to enjoin future statements. See, Plaintiffs' [Proposed] Preliminary Injunction. The litigation privilege is a complete defense to any such attempt.

California's litigation privilege is codified in Civil Code § 47(b):

> A privileged communication or broadcast is one made: . . . (b) in any (1) legislative proceeding, (2) judicial proceeding, (3) in **any other official proceeding authorized by law**, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure . . . (Civil Code § 47(b), emphasis added).

1. The litigation privilege is absolute and broadly construed.

The privilege granted by Civil Code § 47(b) is absolute because it protects even publications made with actual malice or with intent to do harm. *Silberg v. Anderson*, 50 Cal. 3d 205, 218-219 (1990). The California Supreme Court has held that there is no requirement that the communication be "in the interest of justice" to be absolutely privileged. *Id.* at 212. Therefore, communications that are made in connection with and logically related to litigation or other official proceedings do no fall outside of the judicial privilege merely because they are alleged to be fraudulent, perjurious, unethical, or even illegal. *Jacob B. v. County of Shasta*, 40 Cal.4th 940, 957-959 (2007).

The privilege is not limited to pleadings, to oral or written evidence, or to publications in open court *if* the publication is made to achieve the objects of the litigation or proceeding. *Raider v. Thrasher*, 22 Cal. App. 3d. 883, 887 (1972). Persons

[3] Harmoni's PI Motion accurately cites the Ninth Circuit standard for preliminary injunctions, which includes (1) likelihood of success on the merits, (2) likelihood of irreparable harm, (3) balance of the equities, (4) and public interest. (PI Motion 14:4-12.). Here, defenses like the litigation privilege, *Noerr-Pennington* doctrine, rule against prior restraints, and lack of personal jurisdiction obliterate any possibility of success on the merits.

who qualify for the absolute privilege afforded by Civil Code 47(b) include attorneys [*Friedman v. Kanchecht,* 248 Cal.App. 2d 455, 460 (1967)], parties [*Albertson v. Raboff*, 46 Cal. 2d 375, 378-379 (1956)] and witness and prospective witnesses [*Asherman v. Nattinson*, 23 Cal.App.3d 861, 865 (1972)] among others. Because there is no exception to the privilege when the testimony is perjured, courts have held that there is also no exception to the preparation and presentation of false documentary evidence.[4] *Kachig v. Boothe*, 22 Cal.App.3d 626, 641 (1971).

Moreover, statements made *before or after* the litigation or other official proceeding are privileged under Civil Code Section 47(b) if the statement is made in connection with the litigation that is contemplated in good faith and under serious consideration. *Aronson v. Kinsella*, 58 Cal. App. 4th 254, 262 (1997). California courts favor a liberal construction of the scope of jurisdiction and relevancy of Section 47(b). *Lewis v. Linn*, 209 Cal. App. 2d 394, 399 (1962). Under Civil Code Section 47(b), doubts are to be resolved in favor of relevancy and pertinency of the litigation privilege. *Thornton v. Rhodan*, 245 Cal.App.2d 80, 93 (1966).

2. The litigation privilege applies to administrative hearings and quasi-judicial hearings.

A publication or broadcast made in any official proceeding authorized by law is privileged. Civ. Code § 47(b)(3)&(4). The phrase "In any other official proceeding authorized by law" contained in Civil Code § 47(b) encompasses those proceedings that resemble judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and legislative proceedings. *Silberg v. Anderson*, 50 Cal. 3d 205, 218-219 (1990). The general rule is now well-established that the absolute privilege is applicable not only to judicial but also to *quasi*-judicial proceedings. *Id.* at 212. The interpretation of what is considered an official proceeding essentially includes any

[4] Plaintiffs *allege* that false evidence was proffered to the DOC, but this will be disproven if the case proceeds.

proceeding where government officials make decisions effecting others. *Id.* It has been applied even for testimony provided by a pupil as a witness in a school's expulsion hearing. *Educ. Code* § 48918.6.

The primary factors that determine the nature of quasi-judicial proceedings under Civil Code § 47(b) are (1) whether the administrative body is vested with discretion on an investigation and consideration of evidentiary facts; (2) whether it is entitled to hold hearings and decide the issue by application of rules of law to the ascertained facts; and, (3) whether its power affects the personal or property rights of private persons. *Ascherman v. Natanson*, 23 Cal.App.3d 861, 865 (1972).

A communication to an official administrative agency, which communication is designed to prompt action by that agency, is as much part of the "official proceeding" as a communication made after the proceedings have commenced. *Martin v. Kerney*, 51 Cal.App.3d 309, 311 (1975). Moreover, because a complaint or other official filing constitutes part of the official proceedings, it is not necessary that the official body take any particular action on the complaint itself to be protected. *Lee v. Flick*, 135 Cal. App. 4th 89, 97 (2005). The absolute privilege of Section 47(b) has been extended to letters written to the State Division of Real Estate and letters sent to public school teacher superiors — essentially, any written communication that is part of or initiates an official proceeding. See, *King v. Borges*, 28 Cal. App. 3d 27, 34 (1972); and *Martin v. Kearny*, *supra*, at 311. In *Duncan v. Atchison, T. & S. F. R. Co.*, 72 F. 808 (9th Cir. 1896), allegedly libelous statements contained in an answer filed in proceedings before the Interstate Commerce Commission were deemed protected by the litigation privilege.

3. The litigation privilege applies to all tort and quasi-tort claims.

The absolute litigation privilege of Section 47(b) bars derivative tort actions, and applies to all torts other than malicious prosecution, including fraud, negligence, and negligent misrepresentation. *Rubenstein v. Rubenstein*, 81 Cal. App. 4th 1131, 1146 (2000). Federal Courts in the Central District of California consistently uphold this

understanding – and thus confirm that the litigation privilege bars all tort causes of action arising from privileged communications, except a claim for malicious prosecution. *Monex Deposit Co. v. Gilliam,* 680 F.Supp.2d 1148, 1161 (C.D. Cal. 2010).

All six causes of action in Plaintiffs' Amended Complaint are torts and are thus barred by the litigation privilege. The first cause of action for violation of RICO has been consistently held to be a statutory tort. In *Brandenberg v. Sidel*, 859 F.2d 1179 (4th Cir. 1988), the court held "Civil RICO is of course a statutory tort remedy — simply one with particularly drastic remedies. Causation principles generally applicable to tort liability must be considered applicable."

Similarly, in addressing the second cause of action, Unfair Competition claims pursuant to California Business and Professions Code Section 17200, *et. seq.* are statutory torts. *Western Electro-Plating Co. v. Henness*, 196 Cal.App.2d 564, 570 (1961).

Plaintiffs' third cause of action for common law Unfair Competition is also a tort. *Duncan v. Al Stuetzle,* 76 F.3d 1480 (9th Cir. 1996) (referring to "California's common law tort of Unfair Competition.") The remaining three causes of action – Trade Libel, Tortious Interference with Contractual Relations, and Intentional Interference with Prospective Economic Advantage – are also all common law torts, and are thus barred in this case by the litigation privilege. See, *Smith v. Maldonado*, 72 Cal.App.4th 637, 645 (1999) (libel is a tort); *Pacific Gas & Electric Co. v. Bear Stearns & Co*., 50 Cal.3d 1118 (1990) (intentional interference with contractual relations is a tort); *Associates v. Environ Systems, Inc.*,14 Cal.App.4th 842, 845 (1993) (intentional interference with prospective economic advantage is a tort.)

Paragraph 270 of the Amended Complaint lists fifteen alleged "fraudulent statements" that form the basis of Plaintiffs' RICO claim. *Fourteen of those fifteen statements were made to the DOC.* These are the same statements, each in DOC filings, that Plaintiffs' now ask the court to order Defendants to "retract." Under Section 47(b),

the DOC petitions are subject to absolute privilege (a complete defense.) The PI Motion is untenable, and thus, Plaintiffs should not be granted expedited discovery to support a motion that has no realistic chance of success.

D. The *Noerr-Pennington* Doctrine Disallows Plaintiffs' RICO Claim

The *Noerr-Pennington* doctrine derives from the U.S. Constitution's First Amendment guarantee of "the right of the people…to petition the Government for redress of Grievances. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Under the doctrine, "those who petition *any department of the government* for redress are generally immune from statutory liability for their petitioning conduct." *Id.* at 929 (emphasis added) (citing *Empress LLC v. City & County of S.F.*, 419 F.3d 1052, 1056 (9th Cir. 2005).

The doctrine originally arose in the antitrust context and reflected the Supreme Court's effort to reconcile the Sherman Act with the First Amendment Petition Clause. *Id*. at 929. However, the doctrine has since been expanded outside the antitrust field to protect, generally, petitions of any kind to any department of the government pursuant to the Petition Clause of the First Amendment. *Id.* at 930 (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). "In BE & K Construction Co. v. NLRB, 536 U.S. 516, 525 (2002), the Supreme Court expanded on its holding in *Bill Johnson's*, making it clear that the principles of statutory construction embodied in the *Noerr-Pennington* doctrine apply with full force in other statutory contexts." *Sosa*, *supra*, at 930.

Sosa, like this case, involved a RICO lawsuit alleging, as its predicate acts, violations of federal mail and wire fraud statutes. And like this case, in *Sosa* the alleged acts of mail fraud and wire fraud were also acts of petitioning the government. (In *Sosa*, even a pre-petition demand letter was considered part of the process of petitioning the government.) Citing the *Noerr-Pennington* doctrine, the *Sosa* court stated: "We hold that RICO and the predicate statutes at issue here [including mail fraud and wire fraud] do not permit the maintenance of a lawsuit for sending of a pre-litigation demand to settle legal

claims that do not amount to a sham…Our decision today makes clear that the *Noerr-Pennington* doctrine requires that, to the extent possible, we construe federal statutes so as to avoid burdens on activity arguably falling within the scope of the Petition Clause of the First Amendment." *Sosa*, *supra*, at 942.

There is no question that the DOC review requests at the center of Plaintiffs' Amended Complaint involve government petitioning activity. They are textbook examples. The DOC is a "department of the government" as described in *Sosa*, and the alleged acts of mail fraud, wire fraud, and extortion all related to either (1) petitions to the DOC requesting review of Harmoni, or (2) in the case of the extortion predicate act alleged against C. Agriculture, a pre-petition demand letter (which is equally protected.) Accordingly, the *Noerr-Pennington* doctrine mandates that Plaintiffs' RICO claim will be dismissed as soon as Defendants appear and are able to file a Motion to Dismiss. Without RICO, this Court will no longer possess subject matter jurisdiction over the case, unless the Court chooses to exercise continuing jurisdiction (which is discretionary). More importantly, this is yet another reason why Plaintiffs' PI Motion is untenable and, thus, expedited discovery is unjustified.

E. The Rule Against Prior Restraints on Speech Bars Harmoni's PI Motion

Harmoni's PI Motion seeks "to prevent defendants from *continuing to make* fraudulent and false statements…on the record with the DOC." (PI Motion, 23:15-18.) This would violate the rule against prior restraints on speech, which prevents, *inter alia*, courts from issuing injunctions on future speech. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) the Supreme Court collected a number of prior restraint cases and noted, "the thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.* Injunctions against any speech, even libel, constitute prior restraints: they 'prevent speech before it occurs,' by requiring court permission before that speech can be

repeated." *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089 (C.D. Cal. 2012).

When the rule against prior restraints is applied to judicial injunctions (as opposed to legislative enactments), the rationale is not only based on Constitutional considerations, but practical considerations. *Id.* It would be nearly impossible for the Court to predict future circumstances, or how the enjoined speech might be used in context. In this case, Defendants ask to the Court to enjoin Defendants from submitting future "fraudulent and false" statements to the DOC. Yet, a hearing would be required in order to determine whether any future statements were false. It would be a truly outrageous and unprecedented use of injunctive power to require Defendants to seek District Court permission every time they need to make a DOC filing. In that sense, the requested relief is as much unrealistic as it is unconstitutional.

F. The PI Motion Is a Waste of Time Because There is No Threat of Irreparable Harm

The allegedly irreparable harm Plaintiffs complain about is a fiction because there is an adequate remedy at law for the allegedly false submissions to the DOC. Harmoni merely needs to respond to the AR and convince the DOC that it is entitled to retain its 0% cash deposit rates on Chinese garlic. As demonstrated above, Congress has delegated jurisdiction over such matters to the DOC and/or CIT – so there is an adequate remedy at law without the need for injunctive relief.

G. This Court Lacks Personal Jurisdiction

1. Personal Jurisdiction Under R.I.C.O.

Where liability under a federal statute discussing personal jurisdiction is alleged, application of the relevant provisions in the statute is determinative on the issue of jurisdiction. See, *Dole Food Co. v. Watts*, 303 F.3d 1104, 1110 (9th Cir. 2002). In section 1965(b), Congress provided for service of process upon RICO defendants residing outside the federal court's district when it is shown that "the ends of justice" require it. 18 U.S.C. §1965(b). Subsection (b) states: "In any action under

section 1964 of this chapter [18 U.S.C. §1964] in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof." 18 U.S.C. §1965(b).

However, "merely naming persons in a RICO complaint does not, in itself, make them subject to section 1965(b)'s nationwide service provisions." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*,788 F 2nd 535, 539 (9th Cir. 1986). The *Butcher's Union* court stated that "the Unions also failed to allege a multi-district conspiracy that encompassed [two of the defendants]. As the [plaintiffs] concede, none of the four defendant employers had any specific knowledge of, or participation in any of the other conspiracies." *Id* at 539. The Ninth Circuit Court further reasoned that "the district court properly concluded that the complaint did not allege a *single* nationwide RICO conspiracy as required for national service of process under the "ends of justice provision of section 1965 (b)." (Emphasis added). The court held that this standard does not create jurisdictional gaps because it does not prevent plaintiffs from pursuing separate suits against non-resident RICO defendants who did not participate in this single racketeering enterprise. *Id.*

2. The Court lacks personal jurisdiction over Montoya, Crawford and Katz in California

Defendant Joey Montoya, an attorney, has lived his entire life in New Mexico. He currently resides in Santa Fe, New Mexico. (Amended Complaint, ¶ 42.) He attended high school, college, and law school all in the State of New Mexico. Montoya has been to California just one time in his life, in 2008, for a total of three days as part of a post-college "road trip" with friends. Montoya's position with Hume & Associates was his first employment after graduating law school. He is licensed to practice law before the CIT and in the State of New Mexico. (Amended Complaint, ¶ 42.) He has never

practiced law in California. He started work at Hume & Associates in August, 2015, about 5 months before this lawsuit was filed. See, Montoya Declaration, ¶3-4. Plaintiffs now accuse him, vaguely, of participating in an enormous international conspiracy to influence the garlic importation market, charging that he violating federal racketeering laws.

The allegations against Montoya are contained in Section V.D.iii. of the Amended Complaint (paragraphs 227-239; see also ¶ 42). There are no allegations that Montoya was connected to or directed any of his activities toward the State of California. A detailed analysis of specific and general jurisdiction with respect to Montoya is unnecessary because, quite simply, he has *no* contacts with California.

Plaintiffs allege simply that Montoya "verified the authenticity" of two submissions to the DOC—i.e. he signed pleadings. (Amended Complaint ¶ 242.) Based on these ordinary acts of attorney work, Plaintiffs decided it was appropriate to sue this young attorney, fresh from law school, in a Federal RICO lawsuit in a state in which he has been present a total of three days in his life.

There is no personal jurisdiction over Montoya in California, even under RICO's nationwide service of process provisions. Under the *Butcher's Union* standard, Plaintiffs fail to allege (and cannot allege) that Montoya participated in a multi-district conspiracy. His act of signing pleadings as part of his job—protected by the litigation privilege—does not make him part of a multi-district conspiracy. The allegations (of what one assumes was meant to be an association-in-fact enterprise) are so tenuous, based on suggestion and innuendo, that they cannot form the basis of personal jurisdiction in California. Montoya did not have a common purpose with the alleged RICO enterprise – and thus there is no possible "single" conspiracy as required under *Butcher's Union*. He has no vested interest in "acquiring a larger share of the U.S. garlic market." (Amended Complaint ¶ 15.) He is a paid agent. Accepting all of the allegations in the Amended

Complaint as true, Montoya's interest was merely in receiving compensation, via salary from his employer Hume & Associates, for his legal work.

Defendants Crawford and Katz are two garlic farmers living and working in New Mexico. They have been to California on brief vacations, none lasting more than two weeks. Katz has never lived in California, and Crawford has not lived in California since 1968. As the Amended Complaint alleges, they sell their garlic at the Santa Fe Farmer's Market in New Mexico (not California). (Amended Complaint, ¶¶ 42-43.) They do not direct any of their garlic sales to California, nor do they sell to any wholesalers who later re-sell their garlic in California. In short, they have no connection to California whatsoever – aside from occasional vacations. See, declarations of Crawford & Katz, ¶¶2-4. These Defendants should not be required to respond to expedited discovery in the absence of personal jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs *Ex Parte* Application for Expedited Discovery.

LANZA & SMITH, PLC

March 7, 2016

/s/Brodie H. Smith
Brodie H. Smith
3 Park Plaza, Suite 1650
Irvine, CA 92614
Phone: (949) 221-0490
Fax: (949) 221-0027
Brodie@lanzasmith.com
Tony@lanzasmith.com
Attorneys for Defendants
Robert T. Hume, Joey C. Montoya, Stanley Crawford, Avrum Katz, Kwo Lee, Inc., and Shuzhang Li